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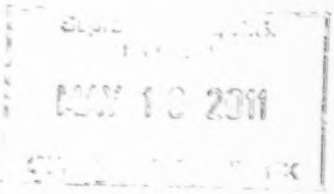

No. 10-1038

IN THE

# Supreme Court of the United States

CONRAD M. BLACK, JOHN A. BOULTBEE, AND PETER Y. ATKINSON,

*Petitioners*,

v.

UNITED STATES OF AMERICA,

*Respondent*.

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## REPLY BRIEF FOR PETITIONERS


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## REPLY BRIEF FOR PETITIONERS

The Seventh Circuit recognized that the honest-services instructions permitted conviction solely for "failure to level with the board and the audit committee." Pet. App. 10a. This Court has already held that "failure to level" is not a crime. Yet the Seventh Circuit deemed the error "harmless" as to count 7 because the defense evidence and arguments were "implausible," "decisively unbelievable," and "clowning," while the government's "disinterested" witnesses provided such "compelling" evidence that "no reasonable jury could have refused to convict." *Id.* at 11a-14a. And although the obstruction charge identified this flawed prosecution as a predicate that could support conviction, the Seventh Circuit ruled the error harmless on identical reasoning: The government's evidence was "compelling," and Black's contrary evidence (such as the "loya[l]" testimony of his assistant) could readily be dismissed as biased. *Id.* at 5a-6a.

We restate the Seventh Circuit's holding and reasoning because the government shows little stomach for addressing them, much less defending them head-on. Instead, the government manufactures alternative rationales that it ascribes to the Seventh Circuit, trots out new theories it never presented below, and never quite gets around to addressing the Sixth Amendment, *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993), *Yates* v. *Evatt*, 500 U.S. 391 (1991), or *Rose* v. *Clark*, 478 U.S. 570 (1986). The government's effort to airbrush these cases out of the law, like its insistence that the Seventh Circuit actually applied a "functional equivalence" analysis, recalls Khrushchev-era apparatchiks excising disfavored

Party leaders from May Day Parade photographs. It is just as unconvincing.

The government ignores this Court's cases because it has so little to say about why the Court's review is unwarranted. The lower courts are deeply divided on the proper application of harmless-error review after *Neder* v. *United States*, 527 U.S. 1 (1999), including particularly whether *Neder* replaced this Court's traditional focus on "the verdict obtained," *Chapman* v. *California*, 386 U.S. 18, 24 (1967), with an abstract inquiry into whether "overwhelming" evidence would have led to the same result anyway. Because the opinion below directly implicates this disagreement and violates the Sixth Amendment, review is warranted.

## I. THE LOWER COURTS ARE DEEPLY DIVIDED ON THE PROPER HARMLESSNESS STANDARD AFTER *NEDER*.

A. The question whether *Neder* jettisoned decades of this Court's harmless-error jurisprudence in favor of an "overwhelming evidence" test has deeply divided the lower courts. The government insists that the so-called "*Neder* standard" is "just another way" of framing the harmless-error inquiry under *Chapman*. Opp. 16. But this is not, as the government would have it, a semantic dispute over alternative ways of accurately stating the holding of *Chapman*, or a "fact-bound disagreement" with a pedestrian application of *Neder*. Opp. 16-17.

As Justice Stevens noted in *Neder*, there is "a distinction of true importance between a harmless-error test that focuses on what the jury did decide, rather than on what appellate judges think the jury would have decided if given an opportunity to pass on an issue." 527 U.S. at 27 (Stevens, J., concur-

ring). Indeed, the government's claim is obviously untrue where, as here, the jury could find guilt on alternative theories, one of which is invalid: Even if a "rational jury" would have convicted the defendant on the valid theory, the error could have contributed to the verdict precisely "because the verdict may have rested exclusively on the insufficient ground." *Zant* v. *Stephens*, 462 U.S. 862, 881 (1983).

*Neder* was, by its terms, limited to cases involving an "omitted element" that "was uncontested and supported by overwhelming evidence." 527 U.S. at 17. The Court described *Neder*'s unusual circumstances as "the legal equivalent of a laboratory test tube," *id.* at 14, and rejected the notion that a hypothetical-reasonable-jury standard in that context would become precedent for dispensing more generally with Sixth Amendment protections. "Happily," the Court said, "our course of constitutional adjudication has not been characterized by [an] 'in for a penny, in for a pound' approach." *Id.* at 17 n.2.

The government nonetheless reads *Neder* as prescribing a hypothetical-reasonable-jury standard for evaluating harmlessness in all cases—one that needn't focus on "what the jury *actually* found." Opp. 17 n.6. Under this "*Neder* standard," it says, an error is harmless if "no properly instructed jury could reasonably have refused to find the defendant guilty." Opp. 16. This argument turns *Neder*'s "penny" into a guinea. It is not only an unreasonable reading of *Neder*, but one explicitly foreclosed by *Evatt*, *Sullivan*, and *Rose*.

Those cases confirm that "the issue under *Chapman* is whether the jury *actually rested its verdict*" on a proper basis, "independently of" and "without reliance on" the error. *Evatt*, 500 U.S. at 404

(emphasis added); *see also Sullivan*, 508 U.S. at 279. Juries *may* "refuse" to convict on the government's evidence—a rule that *Neder* "reaffirm[ed]." 527 U.S. at 17 n.2. Indeed, if *Neder*'s "overwhelming evidence" test were generally applicable, it would necessarily overrule not merely a single "strand of the reasoning in *Sullivan*" (*id.* at 11) but all applications of structural-error analysis—an analysis this Court has reaffirmed since *Neder*. Pet. 23.

B. The lower courts are divided on whether "*Neder* [is] limited to *Neder*-type cases" or is a "test of general application." *State* v. *Hale*, 691 N.W.2d 637, 650-51 (Wis. 2005) (Abrahamson, J., concurring). The government concedes that the Second and Fourth Circuits have reached different conclusions on this issue, but suggests that the disagreement is not widespread. Opp. 25 n.8. It is not *only* the courts of appeals that have divided; there is also widespread disagreement among state courts of last resort.

State courts "permit consideration of the strength of the government's proof" (Opp. 27) as potentially *relevant* when assessing whether the body of evidence that indisputably was accepted by the jury would be less persuasive if one improperly admitted item were removed. Pet. 21. Tellingly, all but one of the cases cited by the government address the improper admission or exclusion of evidence. *See* Opp. 26-27. (The exception, *Lowry*, invoked *Sullivan*'s actual-verdict test. Pet. 33.)

This analysis cannot easily be transplanted to instructional errors, particularly where, as here, an erroneous instruction removes any assurance that the jury considered (much less credited) *any* of the evidence that might establish guilt under a legally

correct view. *Evatt*, 500 U.S. at 405-06. And even in evidentiary cases, *Olden* v. *Kentucky*, 488 U.S. 227, 233 (1988), and several circuit rulings that the government nowhere addresses reject the notion that evidence is "overwhelming" if, as here, the jury acquitted on other charges based on the same evidence. Pet. 24.

In any event, the government has no answer to the view shared by many state courts of last resort that constitutional error cannot be harmless "simply because there is overwhelming evidence of the defendant's guilt" and without "assessing the likely impact of the error on the jury's verdict." *State* v. *Alvarez-Lopez*, 98 P.3d 699, 709-10 (N.M. 2004); *see also*, *e.g.*, *Cooper* v. *State*, 43 So. 2d 42, 43 (Fla. 2010). Those courts, which read *Chapman*, not *Neder*, as providing the controlling standard in the general run of cases, contrast starkly with several others that the government wholly ignores. Pet. 32-33.

The Seventh Circuit took sides in this debate over a decade ago, concluding that *Chapman*'s "contribute to the verdict" standard is "onerous" and "not the proper test" after *Neder*. *Lanier* v. *United States*, 220 F.3d 833, 839 (7th Cir. 2000) (asking instead whether the defendant "would have been convicted" anyway). The decision below continues to apply this view, and it warrants the Court's scrutiny.

C. The lower-court disagreement regarding the appropriate test for harmlessness extends to the context of alternative-theory errors. The government does not dispute that the Tenth and Eleventh Circuits disagree with the Seventh and Eighth Circuits over whether such an error can be deemed harmless solely because the government presented strong evidence of guilt on the valid theory. Pet. 29-30. But it

wrongly claims that the Tenth and Eleventh Circuits' precedents have been "abrogated" by *Hedgpeth* v. *Pulido*, 129 S. Ct. 530 (2008).

*Pulido*'s holding that alternative-theory error is *subject to* harmless-error review (129 S. Ct. at 532) says nothing about the appropriate *method* for determining harmlessness. And in reversing the Ninth Circuit for treating alternative-theory error as structural error warranting automatic reversal, *Pulido* certainly did not "abrogat[e]" earlier decisions that had *applied* harmless-error review. Far from overruling *sub silentio* the *Stromberg-Yates* rule requiring reversal if the basis for the jury's verdict cannot be ascertained, the Court's reasoning was that harmless-error review is appropriate for alternative-theory errors because a court can analyze the *erroneous* part of the instruction just as it could "where the *only* charge on the critical issue was a mistaken one." *Id.* at 532; *see also* Pet. 19. That reasoning validates, rather than "abrogates," the analysis prevailing in the Tenth and Eleventh Circuits.[1]

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[1] No one disputes harmlessness where the instructions, while proffering an invalid theory, necessarily required the jury to find guilt on the *valid* theory. *See, e.g.*, *United States* v. *Rastelli*, 870 F.2d 822, 831 (2d Cir. 1989) (jury instructed *conjunctively* on valid and invalid theories). The question that apparently vexes the government is whether an affirmance on this basis would be labeled "harmless error" or, as *Pulido* suggested in passing, "no violation." 129 S. Ct. at 533; Opp. 17 n.6. Since the government elsewhere recognizes that this scenario—"functional equivalence"—*is* an application of harmless error (while wrongly claiming the court below applied it here), it is difficult to see how this supposed distinction bolsters its reading of *Pulido*.

The government protests that, on *Pulido*'s facts, the State's theory of harmlessness involved assessing whether overwhelming evidence supported the valid theory. Opp. 17 n.6. But even if this was the *State's* theory, all *this Court* held was that alternative-theory errors are not categorically exempt from harmless-error analysis—not that the State's case-specific harmlessness points were well-taken. The Court "express[ed] no view" on that question. 129 S. Ct. at 533.

In any event, the alternative-theory split has deepened since the filing of the petition, with the Third and Fifth Circuits staking contradictory positions on whether "overwhelming" evidence on the valid theory establishes harmlessness. *Compare United States* v. *Skilling*, — F.3d —, 2011 WL 1290805, at *2 n.2 (5th Cir. Apr. 6, 2011) (*Neder* "permits a court to find harmlessness based *solely* on the strength of the evidence supporting the valid theory" (emphasis added)), *with United States* v. *Coniglio*, 2011 WL 791347, at *2 n.4 (3d Cir. Mar. 8, 2011) (unpub.) ("overwhelming evidence" on the valid theory "does not alone carry the day").

## II. THE SEVENTH CIRCUIT DID NOT APPLY A "FUNCTIONAL EQUIVALENCE" APPROACH.

The government devotes less than five pages to the relevant lower-court disagreements; instead, its consistent refrain is that they are not implicated here because, in addition to relying on the "*Neder* standard," the Seventh Circuit found the error harmless under a "functional equivalence" approach: by ruling "that the jury actually found facts establishing [petitioners'] guilt" on the "valid pecuniary fraud theory." Opp. 13-14. The Seventh Circuit neither found

nor could have found the error harmless on this theory.

The functional-equivalence approach recognizes that an instructional error may be harmless "[w]hen the predicate facts relied upon in the [erroneous] instruction" are "so closely related to the ultimate fact" under a correct instruction that "no rational jury could find those facts without also finding that ultimate fact." *Carella* v. *California*, 491 U.S. 263, 271 (1989) (Scalia, J., concurring). Similarly, in a case involving factually overlapping counts, the untainted counts may "operat[e] like special verdicts" to "show [what] the jury found." *Brennan* v. *United States*, 867 F.2d 111, 115 (2d Cir. 1989). By demonstrating that the jury "necessarily found" the requisite facts despite the error, *United States* v. *Brown*, 161 F.3d 256, 259 (5th Cir. 1998) (en banc), the government can satisfy its burden under *Chapman* of negating any "reasonable possibility" that the instructional error "might have contributed to the conviction," 386 U.S. at 23-24.

The government eschews any discussion of the instructions (Opp. 18) because they show that the Seventh Circuit's affirmance on count 7 could not possibly rest on any functional-equivalence analysis: The identical instructions for all fraud counts, far from "necessarily" requiring the jury to find pecuniary fraud, concededly permitted conviction for nondisclosure—"failure to level." Pet. App. 10a. The honest-services charge was thus not a subset of pecuniary fraud, as the government suggests, but provided a significantly *broader* basis for conviction. The jury needn't even have *considered* whether petitioners engaged in theft if it was satisfied by the honest-services theory, Pet. 10-11, and, even if some

jurors did, the unanimity instructions removed any conceivable basis for a "functional equivalence" argument. It was therefore impossible to say—and the Seventh Circuit did not—that a unanimous jury necessarily found theft.

What the government calls "functional equivalence" is something vastly different: the Seventh Circuit's view that, "[i]f the jury believed that failure to disclose legitimate fees was honest services fraud, then it would not have acquitted on the other two Forum/Paxton counts." Opp. 14. Those acquittals, the government says, "make sense" if "the jury's guilty verdict was based on a pecuniary fraud theory." Opp. 14 n.5. The Seventh Circuit's *actual* theory for reconciling the Forum/Paxton verdicts was its erroneous assertion that the acquittals involved agreements with the *victim* (rather than, as the government quietly acknowledges, Opp. 6, a holding company controlled by petitioners). The court's error shows it did not even understand the information's theory of what the criminal scheme was; that scarcely supports the claim that its careful review ensured there was "functional equivalence."[2]

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[2] The government's functional-equivalence arguments also grossly distort the record. Among several examples, Radler testified that Kipnis told him the non-competes had not been signed *two years after the payments*. Opp. 5 n.3; *compare* Pet. App. 189a. Moreover, while Kipnis's memorandum notifying the Audit Committee of non-compete agreements "concerned another transaction" (Opp. 19 n.7) in the *subject line*, the memorandum disclosed that the pending sale to "Paxton and Forum" also "require[d] a noncompete agreement." Pet. App. 321a-322a.

More fundamentally, the government's attempt to "make sense" of the verdicts begs the question and gets the *Chapman* analysis precisely backwards: It *presumes* that the jury "found" the valid alternative if there is any hypothesis of the other verdicts that can be made consistent with this supposed "finding." The most obvious theory for the guilty verdict—that the jury relied on the invalid alternative, as it was told it could—is assumed away at the first step of this "analysis."

## III. THE OBSTRUCTION COUNT IS ALSO TAINTED.

The government attempts to save the obstruction conviction by arguing that it is governed by *Kotteakos* v. *United States*, 328 U.S. 750 (1946), and by misstating the issue as exclusively one of *evidentiary* spillover—an argument that Black *disclaimed* below. The government's arguments are meritless.

A. The government never argued below that *Kotteakos* governs prejudice on the obstruction charge, or that Black bore the burden of proving it. Opp. 20-22. Apart from being waived, those circular arguments are meritless: The government cites *no* authority holding that the duty to assess prejudice under *Chapman* is limited to particular counts, much less only counts that the government self-servingly identifies as being affected by its error. As *Neder* acknowledged, *Chapman* requires analysis of the error's effect on the "verdict obtained," 527 U.S. at 17, and this inquiry would extend to other counts unless "the improper instruction had no bearing on" them, *id.* at 13.

B. The flawed honest-services instruction not only had a "bearing" on the obstruction charge; the instructions tied the two together inextricably. This is not, therefore, a case of mere *evidentiary* spillover,

where the gravamen of the argument is retroactive misjoinder—*i.e.*, that the counts should have been severed because the factual allegations initially supporting joinder turn out to be meritless. *Schaffer* v. *United States*, 362 U.S. 511, 515-17 (1960).

The government devotes its entire argument to refuting an evidentiary "spillover" claim, after Black made abundantly clear that his claim was just the opposite. Because the government is simply pretending that the argument below was about something else, petitioners have included the relevant portions of the Seventh Circuit briefing as an addendum. "Whether or not the same evidence would come in if the minutiae of Delaware law were not at issue," Black explained, "the government's spillover argument does not even address the argument we made: that *this* jury, which *acquitted* Mr. Black on the bulk of the government's case, would likely have credited his innocent explanation for removing his effects if they had known that the honest services theory (on which the three fraud convictions most likely rested) was not mail fraud." Add. 5a-6a. "The spillover prejudice here" occurred *because* of the same "mutually dependent" and "inextricable" connection between "the predicate offenses and the obstruction offense" that allowed the evidence's admission, *id.* at 3a-4a, combined with a *legal* error in the description of one of the predicates on which the jury could permissibly have based its verdict. *See*, *e.g.*, *Yates* v. *United States*, 354 U.S. 298, 312-13 (1957).

C. Whether assessed under *Chapman* or *Kotteakos*, the legal error in defining fraud clearly prejudiced Black: Even if the jury firmly believed that Black had not engaged in theft, it was left with the erroneous impression that he might be motivated

to impede justice because he faced severe criminal penalties for corporate missteps involving related-party transactions and Audit Committee procedures. Thus, as in other cases involving *Yates-Stromberg* errors, it is no answer to say that the jury also had *available* other legally valid alternatives on which its verdict *could* rest. Opp. 22. And the Seventh Circuit resolved that problem just as it addressed the mail-fraud counts—by touting the government's supposedly "compelling" evidence and ignoring or deriding the evidence that supported acquittal. Pet. App. 5a. The government's rehash of the same weak evidence as sufficient to satisfy *Chapman* (Opp. 23) merely confirms the urgent need for this Court's review.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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May 10, 2011

# ADDENDUM

**Nos. 07-4080, 08-1030, 08-1072, 08-1106, consolidated**

**IN THE**
**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

| | |
|---|---|
| **UNITED STATES OF AMERICA,**<br>***Plaintiff-Appellee,***<br>**v.**<br>**CONRAD M. BLACK, PETER Y. ATKINSON, JOHN A. BOULTBEE, and MARK S. KIPNIS,**<br>***Defendants-Appellants*** | **Appeal from the District Court for the Northern District of Illinois, Eastern Division**<br>**No. 05-CR-727**<br>**Judge Amy J. St. Eve** |

## APPELLANTS' JOINT CIRCUIT RULE 54 STATEMENT

* * *

1. The Supreme Court identified the spillover arguments it was remanding as those appearing at "Brief for Petitioners 47-49." *Black*, slip op. at 8 n.14. There Black argued, as he had in the certiorari petition, that "[h]aving acquitted on every other count, the jury had only its incorrect understanding of the law applicable to counts 1, 6 and 7 as reason to believe Black would try to impede a search for the truth." *Black* Petr's Merits Br. 49. Moreover, "[a]ny juror would have had abundant reason to doubt that Black corruptly intended to undermine the factfinding of an official proceeding . . . . That doubt would only have heightened without the influence of considerable prejudicial evidence." *Id.*; *see also Black*

Petr's Merits Reply Br. 24-25 (arguing that a properly instructed jury could have concluded that Black committed "*no* offense at all" and, especially in light of prejudicial evidence from the government's attempt to prove RICO, tax offenses and other frauds, not found persuasive the government's proof on Black's intent).

The government's response treats these arguments as if they were predicated solely on retroactive misjoinder. The government thus suggests that no "spillover" prejudice can ever be shown if the evidence on the reversed counts would have been admissible in an error-free trial, and once again asserts that its evidence of Black's guilt on this count was "strong." Gov't Bail Opp. 16-17 (citing *United States v. Prosperi*, 201 F.3d 1335, 1345 (11th Cir. 2000)). But this analysis is doubly mistaken, because Black is not asserting misjoinder and the evidence on this count on the key disputed element — intent corruptly to obstruct — was remarkably thin.

To begin with, there are a number of broadly related "spillover" doctrines. *See, e.g., United States v. Lazarenko*, 564 F.3d 1026, 1042-43 & n.10 (9th Cir. 2009) (noting that "retroactive misjoinder" and "prejudicial spillover" are "often used interchangeably" even though they are "related" concepts). The branch of the doctrine invoked by the government comes into play when an indictment alleged a basis for trying certain offenses together but the court (at trial or on appeal) later determines that the prosecution failed to prove factual assertions underlying the count that justified joinder. *See Prosperi*, 201 F.3d at 1345 ("Prosperi argues his convictions on the tax counts were impermissibly tainted by the substantial evidence admitted on the mail fraud and money

laundering counts that were dismissed before submission to the jury"). As the Supreme Court long ago recognized, a defendant advancing such a claim essentially asserts that the failure of proof "retroactively" gave rise to a new *error* — misjoinder. *See e.g., Schaffer v. United States*, 362 U.S. 511, 515-17 (1960); *see also United States v. Holzer*, 840 F.2d 1343, 1349-51 (7th Cir. 1988) (Posner, J.) (expressing skepticism of "retroactive misjoinder" branch of the doctrine except in rare cases). And because the gravamen of such a claim is that the counts should not have been tried together at all, courts hold that the claim cannot succeed if the evidence supporting the allegedly misjoined count would have been admissible in any event. Courts apply a similar analysis when one of the counts is reversed because the conduct proven is not a crime at all *and* the remaining convictions are logically *unrelated* to the reversed count. *See, e.g., United States v. Rooney*, 37 F.3d 847, 849 (2d Cir. 1994) (reversed count, which court found not be a crime, was "unrelated to the submission of cost justifications" that furnished the basis for the remaining false-statements counts, and caused the presentation of evidence that otherwise would not be admissible on those counts).

Black is not claiming that counts 1, 6 and 7 were so bereft of evidentiary support that they never should have been tried with the obstruction charge. Nor is he asserting that instructional error in this case demonstrates that those counts otherwise were misjoined with the obstruction count. The spillover prejudice here flows from the "mutually dependent" and "inextricable" connection between the predicate offenses and the obstruction offense, which is precisely what makes joinder *proper*. *E.g., Rajewski*, 526 F.2d at 155. * * *

* * *

Thus, in cases like this, as in *Yates*, the relevant prejudice flows from a *legal* error in the description of one of the predicates on which the jury could permissibly have based its verdict in accordance with its instructions. *See Yates*, 354 U.S. at 311-12 (conspiracy with multiple objects, one of which was not a crime); *Bachellar v. Maryland*, 397 U.S. 564, 569-72 (substantive offense; "in light of the instructions given by the trial judge, the jury could have rested its verdict on any number of grounds," one of which could not constitutionally be made a crime). As the Supreme Court has noted, "[j]urors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law — whether, for example, the action in question . . . fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error." *Griffin v. United States*, 502 U.S. 46, 59 (1991). * * *

* * *

**Nos. 07-4080, 08-1030, 08-1072, 08-1106, consolidated**

**IN THE**
**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

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| **UNITED STATES OF AMERICA,**<br>***Plaintiff-Appellee,***<br>**v.**<br>**CONRAD M. BLACK, PETER Y. ATKINSON, JOHN A. BOULTBEE, and MARK S. KIPNIS,**<br>***Defendants-Appellants.*** | **Appeal from the District Court for the Northern District of Illinois, Eastern Division**<br>**No. 05-CR-727**<br>**Judge Amy J. St. Eve** |

**APPELLANTS' JOINT RESPONSE TO GOVERNMENT'S CIRCUIT RULE 54 STATEMENT**

* * *

* * * The government's "same evidence would have been admitted" argument (Gov't Rule 54 St. 26) misses the target by a wide margin — and for the second time in as many months. As Black clearly argued in his bail papers: "Whether or not the same evidence would come in if the minutiae of Delaware law were not at issue, the government's spillover argument does not even address the argument we made: that *this* jury, which *acquitted* Mr. Black on the bulk of the government's case, would likely have credited his innocent explanation for removing his effects if they had known that the honest services

theory (on which the three fraud convictions most likely rested) was not mail fraud." Black Bail Reply 7.

If much the same evidence would have been admitted, as the government contends, that is precisely because the obstruction charge and the underlying fraud offenses *were* so closely intertwined. It may well be true, as the government urges, that joinder of closely intertwined counts rarely poses a problem in cases where the validity of the jury instructions is not at issue. Gov't Rule 54 St. 25-26 (citing cases assessing prejudice when some counts are dismissed for insufficiency of proof). But none of the cases the government cites addresses the rule that prejudice from *legal* error in one or more counts of conviction will require reversal of another closely intertwined count. Defendants' Rule 54 St. 37-38 (citing cases involving legal error as opposed to failure of proof). Although one would never guess it from reading the government's papers, *that* is precisely the error asserted and established in this case.

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